

E-002/CG-88-489REQUIRING PAYMENT OF COSTS AND ATTORNEYS' FEES

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Darrel L. Peterson	Chair
Cynthia A. Kitlinski	Commissioner
Norma McKanna	Commissioner
Robert J. O'Keefe	Commissioner
Patrice Vick	Commissioner

In the Matter of the Joint Petition of Dakota County and Winona County for an Order Resolving Disputes Relating to Purchases by Northern States Power Company of Electric Power from the Operation of Solid Waste Recovery Facilities to be Located in Dakota and Winona Counties, Minnesota

ISSUE DATE: January 26, 1990

DOCKET NO. E-002/CG-88-489

ORDER REQUIRING PAYMENT OF  
COSTS AND ATTORNEYS' FEES

PROCEDURAL HISTORY

On July 18, 1988, Dakota and Winona Counties (the Counties) filed a joint petition requesting the Commission to resolve contractual disputes between themselves and Northern States Power Company (NSP or the Company). Both Counties were planning to construct and operate solid waste resource recovery facilities capable of generating electrical energy. Once operable, these facilities would earn the Counties the designation of "qualifying facility." When dealing with a qualifying facility, a public utility must purchase all the electricity the qualifying facility can generate at the utility's "avoided cost", the amount it would cost the utility to generate the electricity itself. The dispute between the Counties and NSP arose from their differing formulas for arriving at NSP's avoided cost.

All parties recognized the Commission's authority to resolve this dispute under Minn. Stat. § 216B.164, subd. 5 (1988). Because there were material facts in dispute, the Commission referred the matter to the Office of Administrative Hearings for contested case proceedings under Minn. Stat. § 14.58 (1988). The Administrative Law Judge issued FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDED ORDER on March 27, 1989. Oral arguments were heard before the Commission on May 31, 1989. The Commission issued its ORDER RESOLVING DISPUTES REGARDING TERMS OF CONTRACT BETWEEN UTILITY AND QUALIFYING FACILITIES on July 7, 1989.

The Commission's July 7 Order set out ten main areas of dispute between the Counties and NSP. Each issue was analyzed, including a discussion of the parties' differing views. The Order provided a formula for a resolution of each issue. The Order further required the parties to submit initial comments on implementation of the statutory provisions for awarding costs, disbursements and attorneys' fees. A deadline for submission of initial comments and reply comments was set by the Commission.

Both the Counties and NSP filed petitions for rehearing or reconsideration. On September 26, 1989, the Commission issued an Order denying both petitions.

The Commission reviewed all comments and reply comments regarding the issue of costs, disbursements and attorneys' fees. Oral argument on this issue was held before the Commission on December 12, 1989.

### FINDINGS AND CONCLUSIONS

Under Minnesota statute and rule, the Commission may include costs, disbursements and attorneys' fees in its Order resolving disputes between an electric utility and a qualifying facility.

#### **Minn. Stat. Section 216B.164      COGENERATION AND SMALL POWER PRODUCTION**

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Subd. 5. Disputes. In the event of disputes between an electric utility and a qualifying facility, either party may request a determination of the issue by the Commission. In any such determination, the burden of proof shall be on the utility. The Commission in its order resolving each such dispute shall require payments to the prevailing party of the prevailing party's costs, disbursements, and reasonable attorneys' fees, except that the qualifying facility will be required to pay the costs, disbursements, and attorneys' fees of the utility only if the Commission finds that the claims of the qualifying facility in the dispute have been made in bad faith, or are a sham, or frivolous.

#### **Minn. Rules, Part 7835.4550 FEES AND COSTS**

In the order resolving the dispute, the Commission shall require the prevailing party's reasonable costs, disbursements, and attorneys' fees to be paid by the party against whom the issue or issues were adversely decided, except that a qualifying facility will be required to pay the costs, disbursements, and attorney's fees of the utility only if the Commission finds that the claims of the qualifying facility have been made in bad faith or are a sham or frivolous.

### DETERMINING THE PREVAILING PARTY

In order to apply the aforementioned statute and rule to the case before it, the Commission must first determine who, if anyone, is the prevailing party. This issue is not controlled by Minnesota case law, because there have not yet been any court decisions explicating Minn. Stat. Section 216B.164, subd. 5 (1988). There have been, however, decisions under other statutory attorneys' fee provisions which can provide guidance.

In Hensley v. Eckerhart, 461 U.S. 424 (1983) the U.S. Supreme Court addressed the issue of attorneys' fees following a federal civil rights action. The Court in Hensley stated that a party may be considered as prevailing for attorneys' fee purposes if the party "succeeded on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." Hensley at 433.

### REASONABLENESS OF FEES TO THE PREVAILING PARTY

The Hensley Court considered "success on a significant issue" to be merely a threshold determination for a plaintiff. If the plaintiff passes this test, earning the status of a prevailing party, the fact-finder must then determine what fees would be reasonable for the plaintiff to recover. Reasonableness is determined by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. The plaintiff is bound to provide documentation to support this formula.

The product of reasonable hours times a reasonable rate is then adjusted in two ways by the U.S. Supreme Court in Hensley. First, attorneys' fees are limited to time spent on claims in which the plaintiff prevailed. Second, the plaintiff's level of success is weighed to adjust the award upward or downward.

### THE COMMISSION'S ANALYSIS FOR AWARDING REASONABLE COSTS AND ATTORNEYS' FEES

The Minnesota Supreme Court has commented favorably on the Hensley formula, and in Specialized Tours, Inc. v. Hagen, 392 N.W.2d 520 (Minn. 1986), the Minnesota Supreme Court applied the Hensley doctrine to a securities violation action. The Minnesota Court followed the two-stage analysis of Hensley to determine the reasonableness of an award of attorneys' fees to the prevailing party. First a threshold test for prevailing was applied, then the reasonableness of attorneys' fees to the prevailing party was determined.

The Commission finds that the Hensley analysis as applied in Specialized Tours is a reasonable approach to determining attorneys' fees following resolution of this contractual dispute. This method provides the Commission and interested parties with an applicable formula, yet affords the Commission sufficient flexibility to weigh the unique factors in this case.

### APPLYING THE HENSLEY FORMULA TO THE CASE BEFORE THE COMMISSION, WHO CAN BE SAID TO HAVE PREVAILED FOR THE PURPOSE OF ATTORNEYS' FEES?

#### I. The threshold determination of prevailing party.

The standard to be applied is success on any significant issue which achieves some of the benefit

the parties sought in bringing suit.

Here, the Counties achieved success on the issue of "the equity kicker" or "equity adjustment" proposed by NSP. The issue was significant because if NSP had prevailed, its avoided cost payments to the Counties would have been reduced by nearly one-third. Because the proposal was a novel one, precedent would have been set for future negotiations between utilities and qualifying facilities.

The Counties clearly achieved success on this issue because NSP's proposed reduction was rejected in its entirety by the Commission. No equity adjustment whatsoever may be applied in NSP's avoided cost formula.

Finally, the Counties' success on this significant issue achieved some of the benefit which the Counties sought, because the result will be a large increase in NSP's avoided cost payments. This was the goal which caused the Counties to seek Commission determination of their contract dispute with NSP in the first place.

The Commission finds that the Counties are a prevailing party within the meaning of Minn. Stat. Section 216B.164, subd. 5 and Minnesota Rules Part 7835.4550.

II. Reasonableness of fees to be awarded to the Counties as prevailing parties.

A. Multiplication.

Under the Hensley approach, the starting point for determining the amount of a reasonable fee is the number of hours reasonably expended multiplied by a reasonable hourly rate. The Commission finds that documentation of the hours expended and hourly rates applied must be furnished before the Commission can make a

preliminary determination. This portion of the Hensley formula must await submission of the supporting evidence.

B. Adjustment for degree of success.

The Court in Hensley took the product of rate times hours, then adjusted for degree of success and limited the fees to claims won. Because the Commission must await the prevailing parties' documentation regarding hours, the Commission will not at this time be able to weigh the reasonableness of fees by degree of success attained. The Commission may take this approach when reviewing supporting evidence to arrive at the reasonable costs and fees to be awarded.

C. Limitation of award to successful claims.

In this case the Commission finds that it is reasonable to follow the Hensley court's approach in limiting fee awards to claims upon which the plaintiff prevailed. The parties have submitted a number of issues for determination by the Commission. The ten main issues were examined at length by the Commission in its July 7 Order. It is clear that in this set of facts there are issues upon which the plaintiff could prevail while failing on others.

The Counties have prevailed on the Equity Adjustment issue, as discussed previously. In addition, the Commission finds that the Counties have prevailed on the "Requirement to Conform to Future Amendments to MAPP Agreement" issue. In its July 7 Order, the Commission agreed with the Counties' position that the Counties need only conform to amendments in the Mid-Continent Area Power Pool (MAPP) agreement which do not result in a material change in the rights or obligations of either utility or qualifying facility. This decision was contrary to NSP's view that the Counties must be required to ensure that their facilities conform with all future amendments to the MAPP agreement.

The Commission finds that the Counties have prevailed on the Equity Adjustment issue and the Conformity to Future MAPP Amendments issue. Reasonable costs and attorneys' fees incurred in prevailing on those issues will be awarded.

WERE ANY OF THE COUNTIES' CLAIMS IN BAD FAITH, A SHAM, OR FRIVOLOUS?

Minn. Stat. § 216B.164, subd. 5 (1988) and Minnesota Rules Part 7835.4550 require the qualifying facility to pay attorneys' fees and costs to a utility following a contractual dispute only if the qualifying facility's claims were made in bad faith or were frivolous. In this case, the Counties could be required to pay NSP's documented costs if those costs were incurred in answering a frivolous claim propounded by the Counties.

NSP claimed that two claims asserted by the Counties, the Avoided Societal Cost claim and the Discriminatory Behavior claim, were made in bad faith. It was NSP's contention that the Counties had little or no factual basis behind these claims, and they were therefore either initially asserted in bad faith, or extended beyond the limits of initial good faith.

The Commission finds that the good faith standard for attorneys' fees as found in Minn. Stat. Section 549.21 (1988) is applicable in this case. Although this statute is set out in the context of civil litigation, it is a useful guide for this set of facts.

Under Minn. Stat. § 549.21 (1988), attorneys' fees may be awarded against a party who acted in bad faith, but "[n]othing herein shall authorize the award of costs, disbursements or fees against a party or attorney advancing a claim or defense unwarranted under existing law, if it is supported by a good faith argument for an extension, modification, or reversal of the existing law."

The Commission finds that the Counties presented logical, good faith arguments to support their Societal Cost and Discriminatory Behavior claims against NSP. Although the Counties did not prevail on these claims, the claims were not presented in bad faith within the meaning of Minn. Stat. § 549.21 (1988).

SHOULD THE COUNTIES BE GRANTED A VARIANCE TO ALLOW ACCEPTANCE OF THEIR RESPONSE ONE DAY AFTER THE COMMISSION'S DEADLINE?

The Counties' messenger was caught in traffic and did not reach the Commission's office with the Counties's Response until five minutes after the close of the workday. Because this late filing was inadvertent, and no parties objected to its acceptance, the Commission finds that the Counties' late-filed Response should be accepted.

ORDER

1. The Counties are prevailing parties within the meaning of Minnesota Stat. § 216B.164, subd. 5 (1988) and Minnesota Rules Part 7835.4550.
2. The Counties have specifically prevailed on the issues of Requirements to Conform to Future Amendments to MAPP Agreement. Reasonable costs and attorneys' fees are hereby awarded for costs and fees incurred in asserting these claims. Equity Adjustment and

3. Within 30 days of the date of this Order the Counties shall file documentation of their costs and attorneys' fees and shall serve said documentation on interested parties.
4. NSP and the Department may file responsive comments to the Counties' documentation within 20 days of the expiration of the Counties' 30 day filing period. Following expiration of the aforementioned 20 day period, the Commission will reschedule a meeting for determination of the amount of reasonable costs and fees to be awarded.
5. No claim of the Counties is found to be in bad faith.
6. A variance is hereby granted allowing acceptance of the Counties' responsive filing which was received by the Commission on Monday, October 30, 1989.
7. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Lee Larson  
Acting Executive Secretary

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